NORTHPOINT'S REQUEST FOR A FREE NATIONWIDE LICENSE SHOULD BE REJECTED

- If the Commission reallocates satellite bands for terrestrial use, then it must award the resulting terrestrial licenses through competitive bidding. There is absolutely no policy or legal basis to permit any party to obtain or use satellite spectrum for terrestrial services for free.

- Northpoint's argument that it is the sole applicant for MVDDS in the 12.2-12.7 GHz band and thus that there is no mutual exclusivity requiring an auction should be rejected. MVDDS did not even exist when the application cut-off notice was released. That notice established a cut-off date only for *non-geostationary satellite orbit fixed satellite service* applications – not for *terrestrial service* applications. Under Commission precedent, notice of a cut-off date must be "reasonably comprehensible to people of good faith." (*see McElroy*). A cut-off notice that makes no mention of the (yet to be established) service to which it allegedly applies is not "reasonably comprehensible."

- Even if Northpoint is correct that no other party participated in the interference study conducted by MITRE, that does not preclude the Commission from holding an auction for MVDDS licenses. The Local TV Act of 2000 simply set a deadline for the study to be completed with regard to "technology proposed by *any entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band.*" The plain language of LOCAL simply means that any terrestrial use of DBS spectrum proposed after the enactment of LOCAL must be subjected to a technical review. While the statute specifies a timetable for evaluating pending applications, it does not in and of itself establish a filing window or cut-off for such proposals. Since the Commission hasn't even opened a window for MVDDS applications yet, the MITRE study timetable is not applicable to any applications that might be filed for this service in the future.

- There is no merit to Northpoint's contention that the Open-Market Reorganization for the Betterment of International Telecommunications ("ORBIT") Act precludes the Commission from auctioning licenses to operate in this spectrum. By its terms, the ORBIT Act prohibits the use of competitive bidding only when the spectrum is *used for satellite operations*.

- The D.C. Circuit Court of Appeals' decision, *National Public Radio v. FCC*, 254 F.3d 226 (2001), is not applicable to consideration of Northpoint's application. In *NPR*, the court held section 309(j)(2) of the Communications Act denies the Commission the authority to use auctions for *any* licenses "issued . . . for . . . [noncommercial educational broadcasters]." Section 309(j)(2) does not discuss satellite licenses or applicants for satellite spectrum. Significantly, the ORBIT Act, which *is* applicable to satellite services, only prohibits the Commission from auctioning "orbital locations or spectrum *used for the provision of international or global satellite communications services*." Thus, if the intended use of the spectrum is not satellite service, neither the ORBIT Act nor *NPR* (by implication), would preclude competitive bidding even if the spectrum currently is allocated for satellite service or an applicant currently holds satellite licenses.

- Northpoint essentially is requesting a pioneer's preference – a nationwide 500 MHz license for free – as a reward for its efforts in arguing for the feasibility of the service. Congress, however, has expressly abolished pioneer's preferences.

- As a general matter, Congress's and the Commission's goals of ensuring the highest and best use of valuable spectrum would be far better served by distributing licenses through competitive bidding whenever possible than by granting enormous windfalls to entities that seek to exploit dubious statutory and regulatory loopholes for their own advantage.